

Populism and the Turkish Constitutional Court: the Game Broker, the Populist and the Popular

 verfassungsblog.de/populism-and-the-turkish-constitutional-court-the-game-broker-the-populist-and-the-popular/

Bertil Emrah Oder Di 2 Mai 2017

Di 2 Mai
2017

Populist strategies have for some time been an integral part of Turkish political life employed dominantly by the right wing political parties.¹⁾For populism as a discursive strategy in Turkey see Zafer Toprak, “Populism ve Türkiye’deki Boyutları”, *Tarih ve Demokrasi* (Istanbul: Cem Yayınevi, 1992), pp. 41-62; Reşat Kasaba, “Populism and Democracy in Turkey, 1946-1961”, *Rules and Rights in the Middle East*, edited by E. Goldberg et. al. (Seattle: University of Washington Press, 1993), pp. 43-68; Erdoğan, Necmi, and Tanıl Bora, “‘Biz, Anadolu’nun Bağrı Yanık Çocukları ...’: Muhafazakar Popülizm”, *Modern Türkiye’de Siyasi Düşünce, Cilt 5, Muhazafakarlık*, edited by Tanıl Bora, and Murat Gültekingil, (İstanbul: İletişim Yayınları, 2006), pp. 632–644. For Turkey’s rightist parties and populism see also Nuray Mert, *Merkez Sağın Kısa Tarihi* (Istanbul: Selis, 2007). Appealing to a “national will”, populists in Turkey typically embrace the genuine citizens who are forced to abandon their original cultural identity particularly as Muslims by the bureaucratic elite with its belief in secularization and reform.³⁾For the authentic people argument of populism see Jan-Werner Müller, *What is Populism?*, (Philadelphia: University of Philadelphia Press, 2016), p. 4 and 21.

After transition of Turkey into the multiparty system and adoption of competitive elections, the Democrat Party (DP) first deployed this populist discourse in 1950s, successfully mobilizing the masses against the bureaucratic, statist and secularist elites. The legacy of the DP has been taken over by the succeeding conservative right parties and their leaders, such as Demirel, Özal and Erdoğan. Their indisputable electoral success supported by the populist discourse and policies has shaped contemporary Turkey. Demirel and his Justice Party (AP) complemented the national will discourse with calls for economic development and the “Great Turkey” slogan in 1970s. Özal’s and his Motherland Party’s (ANAP) neoliberal populism emphasized market oriented economic reforms and the empowerment of middle class after the coup in 1980.²⁾For Özal’s neoliberal populism see Ziya Öniş, “Turgut Özal and His Economic Legacy: Turkish Neo-Liberalism in Critical Perspective”, 40 (4) *Middle Eastern Studies* (2004), pp. 113-134. Erdoğan and his Justice and Development Party (AK Party) have portrayed themselves as the protector of the victims suffered by ignorant, secularist, unwise or corrupt policies of previous governments in 2000s. Leaving aside the recent illiberal discourse in Turkey, the AK Party has initially combined the democratization, Europeanization, majoritarian, and religiously sensitive discourse with the anti-establishment argument of populism.⁴⁾For conservative populism and conservative modernism of AK Party see Yücel Taşkın, “AKP’s Move to “Conquer” the Center-Right: Its Prospects and Possible Impacts on the Democratization Process”, 9 (1) *Turkish Studies* (2008), 53-72; Ziya Öniş, “Conservative Globalism at the Cross Roads; The Justice and Development Party and the Thorny Path to Democratic Consolidation in Turkey”, 9 (3) *Mediterranean Politics* (2009), pp. 21-40. It has still the core claim for an exclusive representation for the “nation” against elites dynamically redefined according to the context.

Turkey’s right wing leaders have constantly represented the dominant political preference of the voters after 1950s. As the “people’s authentic representative”, they have regularly claimed to be free from the limits and checks of the bureaucratic elite. This point is the key to identify the complex relationship between populism and democratic politics in Turkey which suffered from overt and subtle forms of military tutelage especially after 1980. It points out difficulties to draw a line between democratic politics, which should be free from military and any other tutelage, and the populist politics refusing a real sense of checks and balances. In fragile democracies like Turkey, the anti-tutelage argument can easily mask the illiberal populism which usually leads to polarization and resentment politics, colonization of institutions and the suppression of civil society. Here, welfare policies and state funds can easily

serve populism to fuel mass clientelism.

Demands for “being free from external limitations” are the major cause of the conflict between the Constitutional Court and the conservative right governments of Turkey. They have defined the elite not only as alienated modernists, secularists, supporters of the state-centered economy, the (Westernized) middle class or wealthy industrialists, but also as judges. Being a counter majoritarian institution, the Constitutional Court has been mostly perceived as another tutelage body confining the national will illegitimately, ever since it was established after the 1960 military coup. The activist case-law of the Court in critical policy preferences, which is sometimes extensively politicized and lack of the sound legal argumentation, has strengthened this image.

Until the 2010 constitutional amendments, the Constitutional Court has frequently clashed with powerful and populist governments in high-profile cases as a game broker. However, after the 2010 constitutional amendments which have reshuffled the Court and the Supreme Council of Judges and Prosecutors, it has increasingly provided judicial support for populist policies. The 2010 amendments have reregulated the number, term limits, selection procedure and eligibility criteria of constitutional judges. While governmental circles presented it as the “rule of law reform” against tutelage, the opponents voiced the concerns of court-packaging and judicial independence. In the meantime, the Court’s reputation as a “defender of defenseless” in human rights litigation has risen. This is triggered in 2012 by the introduction of an individual complaint procedure for the constitutional rights guaranteed also under European Convention of Human Rights (ECHR).

In following observations, I address these changing roles of the Court from a game broker to a popular figure. The future image of the Court in the face of recent presidentialism amendment in Turkey is discussed in the conclusion.

The Constitutional Court in high-profile cases and populism: the game broker

The Constitutional Court’s previous role as game broker in high-profile cases has often been perceived as an illegitimate intervention into the political sphere. Three critical areas are of particular interest to observe the relationship between the impact of Court’s decisions and the populist discourse. These relate in general to the constitutional amendments, the dissolution of *Refah Partisi* (Welfare Party) and the electoral procedure of the state president.

Banning the *Refah Partisi*, the Court has closed the political sphere to a religiously motivated political party which is not only anti-secularist, but also incited to hatred and violence using the tools of populism.⁵⁾E. 1997/1, K. 1998/1, 16 January 1998. The Court’s stance has been also approved by the European Court of Human Rights (ECtHR).⁶⁾*The Welfare Party and others v. Turkey*, Grand Chamber, Application No. 41340/98, 41342/98, 41343/98, 41344/98, 13 February 2003. Considering the moderate approach of the newly established AK Party which has refused the *Refah*’s legacy and favored democratization in its initial years, the religiously conservative right seemed to have learned from the perils of hatred based populism defeated by the Court and ECtHR. However, the decision of the Court in 2008 which sanctioned the AK Party in a controversial dissolution case to the deprivation of the state aid on rather weak grounds has represented a turning point. In dissolution cases, the deprivation of state aid is an alternative and less drastic sanction to be applied to the unconstitutional political parties under Turkey’s closure regime of militant democracy. Nonetheless, the Court ultimately lost the confidence of AK Party government by this ruling. It has subsequently been labeled as an ally of secularist and bureaucratic forces.

Under the Court’s unamendability jurisprudence, its 2008 decision on the removal of the headscarf ban in higher education institutions is also of specific importance to understand the populist backlash in Turkey.⁷⁾E. 2008/16, K. 2008/116, 5 June 2008. The veiling issue has never been discussed by politicians from of a real perspective of rights and freedoms or the status of women in society. It was of course an agenda item of democratic politics, but availing intense populist discourses and strategies of polarization. The uncompromising stand of the secularist opposition (People’s Republican Party-CHP) has also prevented a deliberative approach to the veiling. In such a political climate, the Court has generally followed its own institutional choice purporting the review of constitutional

amendments that are well established in its previous case-law. It has reiterated the entrenched constitutional interpretation prescribing headscarf ban as backed by the ECtHR.⁸⁾E.g. *Leyla Şahin v. Turkey*, Grand Chamber, Application No. 44774/98, 10 November 2005. Accordingly, the Court struck down the constitutional amendments which aim at removing the ban in higher education institutions. This decision has been perceived as an attack to the primacy of politics for the constitutional amendments which prefers a more inclusive secularism.

The case-law on presidential elections in 2007 has also triggered the anti-tutelage debate. Here, the Court had to deal with an unprecedented and scholarly controversial issue regarding the interpretation of the parliamentary quorum of the election process.⁹⁾E. 2007/45, K. 2007/54, 1 May 2007. AK Party who proposed the strongest presidential candidate claimed that the initial quorum for the election had to be determined in line with the general constitutional article on parliamentary decision-making. This article prescribed the one-third majority of the deputies at the Parliament (184 deputies), unless otherwise was provided in specific constitutional provisions. However, the constitutional article on presidential election was defining a specific procedure referring to two-thirds majority (367 deputies) in a less eloquent wording. At the end, the Court's judicial preference interpreted the quorum as a two-thirds qualified majority on the ground of textual and teleological evidences ("consensus for presidency"). The Court's conclusion in this case (the so-called 367 ruling) was not groundless, but it had deficiencies to consider the preparatory works of relevant quorum norms and parliamentary practices which are inconsistent. More significantly, it was a direct challenge to the religiously conservative AK Party government and its presidential candidate Abdullah Gül.

The Court's jurisprudence in such high-profile cases has neither lessened the populist discourse nor tamed the leading political actors who mobilize the voters massively and gain their confidence. Instead, its efforts to challenge majoritarian preferences have created backlash against the Court. It has been repeatedly categorized as a tutelage institution that chains the authentic representatives of the people.

The Court's not very well structured reasoning in high-profile cases could be deemed as one factor undermining its credibility. In political high stakes questions, it should have been expected that the Court adopts a more careful and diligent approach to legal argumentation to avoid *petitio principii*. However, the over-politicization of these issues due to harsh public debate seems more decisive to explain the backlash against the Court. The uncompromising attitudes of the opposition and the involvement of military actors in the discussions hardened also to make a rational political analysis. This fed the populist stance challenging the elite's tutelage including the judiciary. The tutelage debate surrounding the Court and the judiciary has led to the 2010 constitutional amendments.

The Constitutional Court's judicial populism and popularity

The 2010 constitutional amendments mean a new episode for shaping judiciary. The amendments have retained the incumbent judges at the Constitutional Court, but increased the seats on the bench by adding new judges. The appointment procedure and qualification of the judges have been changed where the parliament involves in the selection procedure. Moreover, an individual complaint procedure has been introduced allowing to access the Court for violations of constitutional rights.

The amendments have also changed the structure of the Supreme Council of Judges and Prosecutors by allowing all senior judges and prosecutors to elect a part of the Council's members. When the amendments were challenged in the Constitutional Court, it adopted a rather unsuccessful strategy.¹⁰⁾E. 2010/49, K. 2010/87, 7 July 2010. It annulled a part of the amendment. Without any satisfactory argumentation, it held the "one judge/prosecutor one vote" principle for the Council's elections unconstitutional. This preference of the Court paved the way to the election of candidate lists prepared by government which has dominated discussions in the Council, raising questions regarding the capture of the judiciary by the executive.¹¹⁾For the colonization of institutions as a populist technique see Müller, *What is Populism?*, pp. 44-45.

Since 2010, the Court has increasingly supported the legislative choices of the government in critical cases. This

new deferential approach is distinctive in that it represents not a restrained deference but rather offers explicit judicial backing for controversial policy choices. This ideological change has required major shifts in the Court's case law and established doctrines. The interpretation of the secular state principle is one of the areas portraying such a paradigm shift. Here, the review of educational reform based on the so-called Law 4+4+4 can be a good example.¹²⁾E. 2012/65, K. 2012/128, 20 September 2012. The relevant law is a touchstone for populist policies fostering the majority religion, particularly Muslim identity. In this case, the Court upholds the law providing for courses of Islamic instruction in the middle and high schools curricula. Turkey has already a compulsory religious education system in primary, middle and high schools which has been critically review by the ECtHR as indoctrination of Sunni Islam denying plurality.¹³⁾E.g. *Hasan and Eylem Zengin v. Turkey*, Second Section, Application No. 1448/04, Final 9 January 2008; *Mansur Yalçın and others v. Turkey*, Application No. 21163/11, Final 16 February 2015. The law provides extra elective courses of Islamic instruction fully endorsed by the state. It does not prescribe such courses for any other religion. Drawing on a new concept of "flexible laïcité" for Turkey that embodies the "positive obligation of the state" to facilitate and provide religious services for the majority religion (Islam), the Court upheld the new law. Such an obligation is hardly deducible from the Constitution with its neutral guarantees for freedom of religion and the secular state principle. The Court's judicial populism based on a judge-made theory of the "flexible laïcité" has enhanced religiously populist policies of the government.

Another new phenomenon is that the Court's popularity has been rising.¹⁴⁾These observations on the individual complaint reflect my research output based on the project fully funded by Turkey's National Science Foundation (Nr. 115K449 – The Impact of the Right to Individual Petition on Constitutional Interpretation of International Human Rights Law and the Turkish Judicial System: A Comparative Analysis of the Judicial Patterns of the Turkish Constitutional Court Case-Law between 2010-2017). The reasons for this seem to be largely attributable to the introduction of the individual complaint mechanism implemented since 2012. Complaints can be initiated for violations of the constitutional rights and freedoms under the Turkish Constitution as well as the ECHR and its protocols ratified by Turkey. Until now, judgments of the ECtHR have been observed in a variety of critical cases. Despite the limited argumentative creativity of the Court and extensive translations from Strasbourg jurisprudence, the individual application has had a positive impact overall. Receiving applications from different segments of the society has enhanced the Court's accessibility and visibility in citizens' eyes. Systematic violations or urgent matters of human rights are increasingly brought before the Court. Its case-law on Twitter and You Tube bans, headscarf bans for attorneys, patriarchal surname regulations, freedom of expression issues and particularly journalism, or environmental protection have raised the expectations and public confidence in the Court.¹⁵⁾See especially *Yaman Akdeniz ve Diğerleri Başvurusu*, App. No: 2014/3986, 2 April 2014; *Youtube LLC Corporation Service Company ve Diğerleri Başvurusu*, App. No: 2014/4705, 29 May 2014; *Tuğba Arslan Başvurusu*, App. No: 2014/256, 25 June 2014; *Sevim Akat Eşki Başvurusu*, App. No: 2013/2187, 19 December 2013; *Mehmet Kurt Başvurusu*, App. No: 2013/2552, 25 February 2016; *Erdem Gül ve Can Dündar Başvurusu*, App. No: 2015/18567, 25 February 2015; *Sencer Başat ve Diğerleri Başvurusu*, App. No: 2013/7800, 18 June 2014; *Mehmet İlker Başbuğ Başvurusu*, App. No: 2014/912, 6 March 2014.

However, the Court's popularity is rather fragile due to the formal boundaries of the complaint mechanism and its own self-restrained approach. In general, the Court has tended to dismiss claims regarding electoral fairness or fraud which could be a touchstone to review the constitutional limits of populist strategies.¹⁶⁾*Oğuz Oyan Başvurusu*, App. No: 2015/8818, 14 July 2015. In this inadmissibility decision, the Court has refused to consider the complaint alleging that the principle of electoral fairness was violated in parliamentary elections of June 2015 by the president Erdoğan's rallies. The applicant claimed such rallies undermined the presidential impartiality clause of the Constitution. The Court's popularity seems also endangered because of its tendency to delay dealing with applications in recent politically significant cases, such as the recent detainment of journalists. The Court's delay in these matters could affect its public approval negatively despite its overall admirable stance for the freedom of expression in its previous case-law.

Conclusion

Turkish politics has long known a vast amount of populist strategies and preferences employed predominantly by right-wing governments. Confronted with these, the Constitutional Court has emerged as a decisive actor with three different roles: the game broker (till 2010), the populist (after 2010 constitutional amendments) and the popular actor (after the entry into force of individual complaint mechanism in 2012).

Considering the approval of the recent constitutional amendment in Turkey that introduces a major shift from the parliamentary system to a sort of presidentialism,¹⁷⁾Bertil Emrah Oder, “Turkey’s ultimate shift to a presidential system: the most recent constitutional amendments in details”, [ConstitutionNet](#), 31 January 2017. the Court may play a pivotal role in the new balance of powers. The amendment provides extensive powers for the president with limited parliamentary oversight. Furthermore, the referendum process itself has consolidated the populist strategy in Turkey where an intense polarization prevails. At the end, the amendment has been adopted by a very narrow margin (Yes votes 51.41 % and No votes 48.59 %).

In such a political climate, the Court is unlikely to emerge as a strong game broker once again. However, the Court’s post-2010 populist approach that supports governmental policies in an active manner could also change. The Court could follow a more strategic approach which does not directly clash with presidential preferences and the parliamentary, but refrain at the same time from supporting these institutions to the same degree. Here, its popularity based on the individual complaint case-law will be crucial to test out the limits of careful resistance and survival under populist pressures. All in all, public confidence can serve as a protective factor for the Constitutional Court against populist threats.

References [+]

1. ↑ For populism as a discursive strategy in Turkey see Zafer Toprak, “Populism ve Türkiye’deki Boyutları”, *Tarih ve Demokrasi* (İstanbul: Cem Yayınevi, 1992), pp. 41-62; Reşat Kasaba, “Populism and Democracy in Turkey, 1946-1961”, *Rules and Rights in the Middle East*, edited by E. Goldberg et. al. (Seattle: University of Washington Press, 1993), pp. 43-68; Erdoğan, Necmi, and Tanıl Bora, “Biz, Anadolu’nun Bağrı Yanık Çocukları ...’: Muhafazakar Popülizm”, *Modern Türkiye’de Siyasi Düşünce, Cilt 5, Muhafazakarlık*, edited by Tanıl Bora, and Murat Gültekinil, (İstanbul: İletişim Yayınları, 2006), pp. 632–644. For Turkey’s rightist parties and populism see also Nuray Mert, *Merkez Sağın Kısa Tarihi* (İstanbul: Selis, 2007).
2. ↑ For Özal’s neoliberal populism see Ziya Öniş, “Turgut Özal and His Economic Legacy: Turkish Neo-Liberalism in Critical Perspective”, 40 (4) *Middle Eastern Studies* (2004), pp. 113-134.
3. ↑ For the authentic people argument of populism see Jan-Werner Müller, *What is Populism?*, (Philadelphia: University of Philadelphia Press, 2016), p. 4 and 21.
4. ↑ For conservative populism and conservative modernism of AK Party see Yücel Taşkın, “AKP’s Move to “Conquer” the Center-Right: Its Prospects and Possible Impacts on the Democratization Process”, 9 (1) *Turkish Studies* (2008), 53-72; Ziya Öniş, “Conservative Globalism at the Cross Roads; The Justice and Development Party and the Thorny Path to Democratic Consolidation in Turkey”, 9 (3) *Mediterranean Politics* (2009), pp. 21-40.
5. ↑ E. 1997/1, K. 1998/1, 16 January 1998.
6. ↑ *The Welfare Party and others v. Turkey*, Grand Chamber, Application No. 41340/98, 41342/98, 41343/98, 41344/98, 13 February 2003.
7. ↑ E. 2008/16, K. 2008/116, 5 June 2008.
8. ↑ E.g. *Leyla Şahin v. Turkey*, Grand Chamber, Application No. 44774/98, 10 November 2005.
9. ↑ E. 2007/45, K. 2007/54, 1 May 2007.
10. ↑ E. 2010/49, K. 2010/87, 7 July 2010.

-
11. ↑ For the colonization of institutions as a populist technique see Müller, *What is Populism?*, pp. 44-45.
-
12. ↑ E. 2012/65, K. 2012/128, 20 September 2012.
-
13. ↑ E.g. *Hasan and Eylem Zengin v. Turkey*, Second Section, Application No. 1448/04, Final 9 January 2008; *Mansur Yalçın and others v. Turkey*, Application No. 21163/11, Final 16 February 2015.
-
14. ↑ These observations on the individual complaint reflect my research output based on the project fully funded by Turkey's National Science Foundation (Nr. 115K449 – The Impact of the Right to Individual Petition on Constitutional Interpretation of International Human Rights Law and the Turkish Judicial System: A Comparative Analysis of the Judicial Patterns of the Turkish Constitutional Court Case-Law between 2010-2017).
-
15. ↑ See especially *Yaman Akdeniz ve Diğerleri Başvurusu*, App. No: 2014/3986, 2 April 2014; *Youtube LLC Corporation Service Company ve Diğerleri Başvurusu*, App. No: 2014/4705, 29 May 2014; *Tuğba Arslan Başvurusu*, App. No: 2014/256, 25 June 2014; *Sevim Akat Eşki Başvurusu*, App. No: 2013/2187, 19 December 2013; *Mehmet Kurt Başvurusu*, App. No: 2013/2552, 25 February 2016; *Erdem Gül ve Can Dündar Başvurusu*, App. No: 2015/18567, 25 February 2015; *Sencer Başat ve Diğerleri Başvurusu*, App. No: 2013/7800, 18 June 2014; *Mehmet İlker Başbuğ Başvurusu*, App. No: 2014/912, 6 March 2014.
-
16. ↑ *Oğuz Oyan Başvurusu*, App. No: 2015/8818, 14 July 2015. In this inadmissibility decision, the Court has refused to consider the complaint alleging that the principle of electoral fairness was violated in parliamentary elections of June 2015 by the president Erdoğan's rallies. The applicant claimed such rallies undermined the presidential impartiality clause of the Constitution.
-
17. ↑ Bertil Emrah Oder, "Turkey's ultimate shift to a presidential system: the most recent constitutional amendments in details", [ConstitutionNet](#), 31 January 2017.
-

LICENSED UNDER CC BY NC ND

SUGGESTED CITATION Oder, Bertil Emrah: *Populism and the Turkish Constitutional Court: the Game Broker, the Populist and the Popular*, *VerfBlog*, 2017/5/02, <http://verfassungsblog.de/populism-and-the-turkish-constitutional-court-the-game-broker-the-populist-and-the-popular/>, DOI: <https://dx.doi.org/10.17176/20170502-122830>.